2010

Nadine Gillmor v. FAMILY LINK, LLC, a Utah limited liability company; DAVID K. RICHARDS, an individual; BARRY TODD MILLER, an individual; JOAN ELLEN MILLER, an individual; DOUG CARL DOHRING, as an individual and as a Trustee; LAURIE ANN DOHRING, an individual; KENNETH W. MACEY, an individual; ROBIN A. MACEY, an individual. : Brief of Appellant

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Edwin C. Barnes, Elizabeth T. Dunning, Keith W. Meade; attorneys for appellees.

IN THE SUPREME COURT OF UTAH

NADINE GILLMOR, Appellant, vs. FAMILY LINK, LLC, a Utah limited liability company; DAVID K. RICHARDS, an individual; BARRY TODD MILLER, an individual; JOAN ELLEN MILLER, an individual; DOUG CARL DOHRING, as an individual and as a Trustee; LAURIE ANN DOHRING, an individual; KENNETH W. MACEY, an individual; ROBIN A. MACEY, an individual. Appellees.	**BRIEF OF APPELLANT** Case No. 2010-0120

Appeal from the Court of Appeals, Judges Thorne, Bench and Greenwood.

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JURISDICTION

This Court has jurisdiction over this matter pursuant to §78A-3-102(3)(a), UTAH CODE ANN. This Court granted the Petition for Certiorari on May 13, 2010.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. *Res judicata*: Whether the claim asserted in the Complaint was barred by *res judicata*.

Standard of Review:

> When exercising our certiorari jurisdiction, 'we review the decision of the court of appeals, not of the trial court.' The court of appeals' determination of whether res judicata bars an action presents a question of law. 'When reviewing questions of law, we accord no particular deference to the conclusions of law made by the court of appeals but review them for correctness.'
>
> *Macris & Assoc., Inc. v. Neways, Inc.*, 16 P.3d 1214, 1218 (Utah 2000).

The decision of the Court of Appeals, on whether the Complaint was barred by *res judicata*, was divided and this Court should make the law clear for future litigants.

2. Rule 11 Sanctions: Did the Complaint in the underlying action violate Rule 11(b)(2), warranting sanctions.

Standard of Review: "[T]he standard of review for evaluating ... rule 11 sanctions involves a three-tiered approach: '1) findings of fact are reviewed under a clearly erroneous standard; 2) legal conclusions are reviewed under the correction of error standard; and 3) the type and amount of sanction to be imposed is reviewed under an abuse of discretion standard.'" *Morse v. Packer* 15P.3d 1021, 1025 (Utah 2000) (citing *Barnard v. Sutliff*, 846 P.2d 1229, 1234 (Utah 1992).

STATEMENT OF THE CASE

a. Nature of the case: This appeal is from a decision of the Utah Court of Appeals, *Gillmor v. Family Link, LLC, et. al.*, 224 P.3d 741, 749 (Utah Ct.App. 2010), regarding *res judicata* and Rule 11(b)(2) sanctions. (*Gillmor* at ¶¶1, 8, 10, 15-21, 28.) The Court of Appeals heard appeals from two final Orders issued by the Honorable Judge Robert K. Hilder, in the Third Judicial District Court for Summit County, Utah. One order granted a motion to dismiss (R. 154-156) by Defendants/Appellees (collectively "Family Link") and the other granted a motion for Rule 11 sanctions. (R. 195-205.)

The underlying case concerns a dispute over access to a very large parcel of land (a few thousand acres) that is essentially landlocked. (R. 2 and 197; *see also Gillmor* at ¶3.) As a result of a prior interpretation of a settlement agreement between some persons related to the parties in this action, the parcel of property

is accessible only to Gillmor personally (and a few others)[1], and then only for very limited purposes, including animal husbandry and hunting. *Gillmor v. Macey*, 2005 UT App 351, 121 P.3d 57; *see also Gillmor* at ¶3. The road to the Gillmor property, however, has been in use by the public as a thoroughfare continuously for at least ten years (and actually closer to 100 years) for numerous purposes. (R. 110, p. 24 l. 23 – p. 25 l. 21.)

b. Course of the proceedings: In this matter, Gillmor filed a Complaint seeking private condemnation and/or "highway-by-use" over Family Links' lands. (R. 1-7.) Family Link filed Motions to Dismiss the Complaint, arguing judicial estoppel and *res judicata*. (R. 22) Gillmor opposed the Motions to Dismiss, arguing that her Complaint contained new claims, involved parties not included in the previous actions, and on other grounds. (R. 70-77.) Family Link was also granted Rule 11 Sanctions. (R. 111-112.)

c. Disposition at trial court: The District Court granted the Motion to Dismiss only on the grounds of *res judicata*. (R. 109.)[2] Following the Order

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1 Gillmor's children from a prior marriage are ineligible to inherit the rights of use because the lawyer for Frank Gillmor, an old sheepherder at the time, used the word "consanguinity" in the Settlement Agreement to describe future rights.

2 Gillmor chose not to seek Rule 11 sanctions for Family Link's attempt to dismiss based on judicial estoppel, even though the law on that point was crystal clear

Granting the Motion to Dismiss (R. 154-156), Family Link was also granted Rule 11(b)(2) sanctions. (R. 195-205.)

d. Disposition in the Utah Court of Appeals: The Utah Court of Appeals, in a split decision, upheld both orders by the District Court. (*Gillmor* at ¶¶14, 18 and 19.) The dissent, however, argued that *res judicata* did not apply and, therefore, that Rule 11 sanctions could not have been awarded. (*Gillmor* at ¶¶25-28.) The majority decision of the Court of Appeals did not address how Rule 11 sanctions could be warranted given that the position of Gillmor's counsel – that Gillmor's Complaint was not barred by *res judicata* – was supported by a Judge of the Court of Appeals.

RELEVANT FACTS

Gillmor owns a very large tract of property that is effectively landlocked as a result of topography and a prior court ruling. *See, Gillmor v. Macey*, 2005 UT App 351, 121 P.3d 57; *see also* R. 2 and 197; *see also Gillmor* at ¶3). Family Link owns lands that stand between Gillmor's property and the most convenient presently declared public road. (R. 3; *see also Gillmor* at ¶¶2 and 3.) Family Link has been unwilling to allow Gillmor to have reasonable access to her property. (R. 5, see also *Gillmor* at ¶4.) Gillmor brought this action to obtain reasonable access to her property under two legal theories – "highway-by-use" (R. 5; *see also*

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and Family Link had no legitimate basis for making the claim - as the District Court found. (R. 229, p. 26 ll. 4-13).

Gillmor at ¶¶4 and 24-27) (Utah Code Ann. §72-5-104 (2001)) and condemnation (R. 4 and R. 229, p. 29 l. 20 – p. 30 l. 7; *see also Gillmo*r at ¶¶4 and 24-27). This action was the first time that suit was brought that included as defendants all of the property owners who block access from Gillmor's property to a road and this Complaint was the first time that these two specific claims have been raised. (R. 1-7; *see also Gillmor* at ¶¶24-27.)

In 1984 Gillmor's now-deceased husband, Frank Gillmor, brought an action against only the largest landowner between Mr. Gillmor's property and the main Weber Canyon Road, David K. Richards. (R. 31, Exhibit No. 2 and R. 110, p. 29 ll. 20-23; *see also Gillmor* at ¶2.) In that action Mr. Gillmor sought access to his property either by a prescriptive easement or by an irrevocable license across Mr. Richards' property. (*Id.*) That action ended over 20 years ago with a settlement agreement between Mr. Richards and Mr. Gillmor providing for some access to the Gillmor property across Mr. Richards' property. (*Id.*) As a settlement, preclusion does not attach to the 1984 action or its resolution.

In 2001, Ms. Gillmor brought suit against Mr. Richards to determine and enforce the terms of the 1984 settlement agreement so that she and others could continue to access the Gillmor property. (R. 31, Exhibit No. 1; *see also Gillmor* at ¶3.) The 2001 action ended when the Utah Court of Appeals interpreted the settlement agreement and left Gillmor's property essentially landlocked, limiting access just to Mrs. Gillmor and a limited few others, and for very limited purposes. (*Id.*) The Court of Appeals, interpreting the 1984 settlement

agreement, specifically found that the easement created in the agreement did not run with the land and would not inure to a future landowner, or even to Gillmor's children who were non-consanguinous to Frank Gillmor. *Gillmor v. Macey*, 2005 UT App 351, ¶¶19 and 23, 121 P.3d 57; *see also Gillmor* at ¶3.

This action does not arise from the 1984 settlement agreement, or from the 2001 lawsuit to interpret and enforce the settlement agreement. Instead, the issues in this case arise from and concern Gillmor's statutory rights. (R. 1-7; *see also Gillmor* at ¶¶24-27.) Importantly, following resolution of the 2001 case, "highway-by-use" law in Utah changed significantly.

This case is completely unlike the prior lawsuits. Gillmor does not here seek a private easement over anyone else's property or any legal redress based on the settlement agreement in her husband's 1984 case. Instead she brought new statutory claims independent of the 1984 settlement agreement. (R. 1-7 and R. 229, p. 3 ll. 4-6; *see also Gillmor* at ¶¶4 and 24-27.) Moreover, this action is brought against all the landowners who block her property from declared public roads, not just Mr. Richards and his successors-in-interest. (R. 1-7).

Family Link filed Motions to Dismiss under two theories, judicial estoppel and *res judicata*. (R. 22; *see also Gillmor* at ¶4). The District Court rejected the judicial estoppel argument but granted the Motion on the grounds of *res judicata*. (R. 109; *see also Gillmor* at ¶7.) Thereafter, Family Link filed a Motion for Rule 11 Sanctions that the District Court granted. (R. 195-205; *see also Gillmor* at ¶8.)

This case involves new parties and different claims than those previously decided. (R. 1-7.) It is not barred by *res judicata* and sanctions should not have been granted. Even if *res judicata* applied, sanctions are improper and unwarranted because counsel had a reasonable basis for filing the Complaint, as shown by, among other things, the fact that a Judge of the Court of Appeals also believed that *res judicata* did not bar the Complaint.

SUMMARY OF THE ARGUMENT

Gillmor's Complaint was not barred by *res judicata*. The claims asserted in the Complaint had not been brought in any prior action, depended on facts which were not at issue in any prior action, involved statutory arguments completely distinct from and independent of the claims in previous actions, and was the first case to involve all of the landowners that block Gillmor's property access. (R. 1-7.) Rule 11 sanctions were not appropriate in this case because Gillmor's counsel filed the Complaint after researching the facts and the law and determining that Gillmor's claims were warranted under existing law or at least were not contrary to any existing Utah authority. Moreover, that a reasonable lawyer could advance the claims is proven by the fact that one member of the Court of Appeals agreed that Gillmor's claims were not barred by *res judicata*.

ARGUMENT

I. A. *Res Judicata* does not bar Gillmor's Complaint.

Res judicata does not apply in this case for, *inter alia*, the reasons clearly and correctly articulated by Judge Thorne in his dissent below:

The suits initiated in 1984 and 2001 were private claims, the first for a prescriptive easement or irrevocable license and the second for a declaration of rights under the easement agreement negotiated in the previous case. These private claims are different than and may be pursued separately from the public interest claim under Utah Code Section 72-5-104 (the Dedication Statute) as initiated in the present suit. See Utah Code Ann. §72-5-104 (2009).

Although the public interest claim could have been presented in either the 1984 or 2001 suit, I do not believe that it should necessarily have been raised in the previous actions for several reasons. First, neither Mr. Gillmor in his 1984 action nor Mrs. Gillmor in her 2001 action were obligated to bring a public claim – seeking a right for the members of the public to use the Richards property – in their pursuit of a determination of their own private right to use of the property. Indeed, the Gillmors' decision not to pursue a public claim under the Dedication Statute ought not preclude any member of the general public from initiating such a suit at a later time. The objective of claim preclusion is 'that a

controversy should be adjudicated only once,' see Mack v. Utah State Dep't of Commerce, 2009 UT 47, ¶29, 635 Utah Adv. Rep. 79 (internal quotation marks omitted). This, however, is not feasible in the present case where members of the public may still pursue a public claim regardless of prior private right litigation.

Application of claim preclusion in this matter would lead to an illogical result. A literal application of claim preclusion in the present case would have the effect of preventing all members of the public from bringing a public claim based on the *res judicata* ruling barring the Gillmors from pursuing such a public claim. Even if claim preclusion were applied only to the Gillmors, the majority's decision today would be illogical in that it would prevent the Gillmors from pursuing a claim which any other member of the public might bring seeking the declaration of a public right in this piece of property. Instead of ending a dispute about the rights pertaining to a parcel, the majority decision simply delays the resolution for another day.

Second, the private claims asserted in the 1984 and 2001 actions are inherently different and require

> the presence of different factual determinations than the present public claim under the Dedication Statute. . . .

Gillmor at ¶¶24-27 (emphasis added).

> The 1984 action asserted a claim for prescriptive easement. To establish a prescriptive easement, a claimant 'must establish a use that is open, notorious, adverse, and continuous for at least twenty years.' Edgell v. Canning, 1999 UT 21, ¶8, 976 P.2d 1193. The 2001 action sought a declaration of rights under the easement agreement negotiated in the previous case. Neither of these two causes of action require, as does the present claim, proof that the property has been continuously used by the public as a public thoroughfare. See Jennings Inv., LC v. Dixie Riding Club, Inc., 2009 UT App 119, ¶10, 208 P.3d 1077, cert. denied, 215 P.3d 161 (Utah 2009). 'To satisfy the public thoroughfare element, [p]laintiffs must demonstrate proof of (i) passing or travel, (ii) by the public, and (iii) without permission.' Id. ¶11.

Gillmor at n. 7 (emphasis in original).

Just because the claims are for access does not mean the claims are so interrelated to those brought in previous suits that *res judicata* automatically or

necessarily applies. *See Schaer v. State*, 657 P.2d 1337 (Utah 1983) and *Searle Bros. v. Searle*, 558 P.2d 689 (Utah 1978). Courts did not find *res judicata* applicable in *Schaer* or *Searle*, even though all of the actions were about access and involved the same parties.

Gillmor's case is surprisingly similar to the facts in *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983). *Schaer* also involved multiple lawsuits and property access. In *Schaer* the State of Utah condemned 4.6 acres of Schaer's 22.8 acre property to build a highway in 1967. Schaer asked for and received severance damages because the condemnation landlocked the remainder of his property. The Court specifically found that the action left the remainder property with no access.

More than a decade later Schaer instituted another suit seeking an access road to the remainder of the property so he could develop it for residential use. This Court found that *res judicata* did not bar his second case:

> . . .because it is based on a different claim, demand or cause of action than that of the 1967 litigation. The two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action. Moreover, the evidence of the two causes of action relates to the status of the property in two completely different and separate time periods.

Id. (emphasis added).

This case too is based on a different state of facts than the prior action, involves evidence of a different kind than was or would have been necessary in either of the previous lawsuits, and is grounded in distinct legal theories. The 2001 case sought to interpret and enforce a private party contract. The instant case seeks to apply statutory rights that are either public or quasi-public.

Consequently, Gilmore's claims, as in *Schaer*, are not barred by *res judicata* since either a declaration of condemnation (R. 229, p. 29 ll. 21-24) or "highway-by-use" (R. 229, p. 23 ll. 13-18) to access the property require a different state of facts and evidence then interpreting a private settlement agreement between two parties.

> [W]here the second cause of action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which

> were not at issue in the first proceeding, even though such points might have been tendered and decided at that time.

Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948) (internal citations omitted) (emphasis added). Gillmor is entitled to have a court determine whether any member of the public can access this property via condemnation or "highway-by-use" (R. 229, p. 35 ll. 4-5), because that is a different claim sounding in different law than the mere interpretation of a settlement agreement. Imposing *res judicata* in this situation would be contrary to established Utah law: the Court "resolve[s] all doubts in favor of permitting parties to have their day in court on the merits of a controversy". *BYU v. Tremco*, 2005 UT 19, ¶28 (citation omitted), 110 P.3d 678. If there is any doubt whether *res judicata* exists here the doubt should be resolved in Gillmor's favor and this dispute should be remanded to the District Court.

Hill v. Seattle First Nat'l Bank, 827 P.2d 241 (Utah 1992) also supports Gillmor's position. In *Hill*, the parties were involved in a contract dispute. A first action was brought and concluded in federal court regarding the contract between the parties and then a second action based on the same claims was brought in state court.

> Because we hold that the prior federal court proceeding never fully explored the contractual relationship between Hill-Magnum and Seattle First,

> collateral estoppel does not prevent Hill-Mangum from relitigating the issue. *Id.* at 242 (emphasis added). * * *
>
> After the federal court's decision, Hill-Mangum brought the same claims against Seattle First in state court, alleging, inter alia, that Seattle First ... breach[ed] an oral contract with Hill-Mangum. *Id.* at 244 (emphasis added). * * *
>
> We agree that the federal court ruling bars any claim Hill-Magnum might base on the written agreement. However, to the extent that the trial court relied on collateral estoppel to bar an enquiry into the rights created by an oral agreement, it erred. *Id.*

Both of the claims in *Hill* were based in contract yet this Court allowed the second case to proceed as to the oral contract because the first case only resolved the written contract. Similarly Gillmor should not be precluded from seeking public access to her property against all landowners that block her access through statutory claims that have never been brought or reached by any court. (R. 70-77).

B. *Res judicata* is inapplicable in this case because there was a change in the law.

The U.S. Supreme Court recognizes "the general Rule that *res judicata* is no defense where between the time of the first judgment and the second there has

been an intervening decision or a change in the law creating an altered situation." *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 162 (1945) (emphasis added).

There has been just such a change in the "highway-by-use" law, which allows Gillmor to bring her Complaint. (R. 229, p. 47 l. 10 – p. 48 l. 25) The change in "highway-by-use" law supports Gillmor's request for access to her property. As Gillmor's counsel explained to the District Court, "[I]f the Court reads ... the road-by-use trilogy that came down just a month or so ago from the Supreme Court, it's clear that any Tom, Dick or Harry on the street has a right to bring a road-by-use case." (R. 229, p. 30 ll. 10-15). This change in law precludes a finding of *res judicata* on the "highway-by-use" claim in Gillmor's Complaint. (R. 1-7). The change in "highway-by-use" law supports Gillmor's request for access to her property:

> The lack of clarity in this area of the law stems largely from the fact that we have never set forth a standard for determining what qualifies as a sufficient interruption to restart the running of the required ten-year period under the Dedication Statute. We do so now by setting forth a bright-line Rule by which we intend to make application of the Dedication Statute more predictable: An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and

> is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute.

Wasatch County v. Okelberry, 2008 UT 10, ¶15 (emphasis added), 179 P.3d 768.

Moreover, the Court of Appeals decision against Gillmor in the 2001 case created just such an altered situation for Gillmor when it lessened the orivate access she believed she had. Until the Court of Appeals' decision, Gillmor did not have reason to believe that she and her children lacked meaningful access to the property, or that she would need to establish the existence of a public right of way. Therefore, *res judicata* does not bar her from bringing this Complaint. As stated by Gillmor's counsel, "[Gillmor's] position in the 2001 case was for rights about this big (demonstrating) and, when the Court of Appeals finished with it, the rights were maybe a teeny, tiny sliver of what Ms. Gillmor was arguing for. At that point, it's a pretty clear argument that the facts have ... materially changed." (R. 110, p. 35 l. 23 – p. 36 l. 4).

In Gillmor's case both the facts and the law have changed. Therefore *res judicata* should not have been applied because courts should be careful about the preclusive effects of prior decisions, *Zufelt v. Haste, Inc.*, 142 P.3d 594, 598 (Utah Ct. App. 2006), and this Court should remand the matter to the District Court decide the claims in Gillmor's Complaint.

Condemnation is the other cause that Gillmor brings in the Complaint and, contrary to Family Links' position, condemnation could not have been argued in

the alternative in the 2001 (or the 1984) action: As noted by Gillmor's counsel, "[t]he need for condemning an access doesn't arise under the condemnation statutes if you have access. That's a sine qua non of condemnation, that it is, quote, necessary, close quote." (R. 229, p. 29 ll. 21 – 24).

Gillmor had no need to seek condemnation when she thought she had private access. However the interpretation of the 1984 agreement was that Gillmor, in fact, did not have the private access she believed. Therefore, she brought a public claim for condemnation, a claim that, in fact, any member of the public, that meets the applicable requirements, is entitled to bring pursuant to UTAH CODE ANN. §78B-6-501(1)(e).

II. Sanctions should not have been awarded because Rule 11(b)(2), UTAH. R CIV. P., was not violated.

Rule 11 requires that an attorney make a reasonable inquiry into the validity of the action prior to filing a complaint, which Gillmor's attorney did. (R. 110, p. 24 ll. 3-9 and R. 229, p. 32 ll. 12-19).

> [B]y presenting a pleading ... an attorney ... is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, * * * (b)(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the

> extension, modification, or reversal of existing law or the establishment of new law.
>
> Rule 11, UTAH R. CIV. P. (emphasis added).

If a Judge on the Court of Appeals of Utah agrees with the position of Gillmor's counsel, then how can that position be so unreasonable as to warrant sanctions under Rule 11, UTAH. R. CIV. P? As Judge Thorne stated in his dissent:

> Because I would reach a different conclusion on the issue of *res judicata* than the majority, it follows that Mrs. Gillmor's claim was asserted with a good faith argument against *res judicata see* UTAH. R. CIV. P. 11(b)(2) (proving that rule 11 is violated when an attorney fails to make a reasonable inquiry to assure that 'the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law'), is 'objectively reasonable under all the circumstances,' Barnard v. Sutliff, 846 P.2d 1229, 1236 (Utah 1992), and should not result in rule 11(b) sanctions. Even if I am wrong and have erroneously applied the claim preclusion branch of *res judicata*, this is not enough to support a rule 11 violation. See id. ('[T]he mere fact that

> the attorney's view of the law was wrong cannot support a finding of a rule 11 violation.') Accordingly, I would reverse the district court's decision concerning the imposition of sanctions.

Gillmor at ¶28.

The majority decision of the Court of Appeals of Utah below fails to address this key point. Is Judge Thorne's view unreasonable on its face? Surely not. In such circumstances, sanctions under Rule 11 are not warranted.

Rule 11(b)(2) was not violated. First, Gillmor's claims have not been brought in any other suit. Second, the claims are warranted by existing law. (R. 229, p. 35 ll. 9-16). Finally, Gillmor's claims are not "frivolous."

"Frivolous filings are 'those that are both baseless and made without a reasonable and competent inquiry.'" *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997) (citation omitted). Before bringing this case, Gillmor's attorney did the research that Rule 11(b)(2) requires (See *Gillmor* at ¶28):

> [S]ome of this is not in the record because this is a notice pleading state, and I'm not going to tell you what the record will show if we get ... past this motion. Because I knew this motion was coming up. There's no question, when I filed the complaint, they sent a Rule 11 threat letter. They graciously backed off the Rule 11 threat letter,

> but they made the motion nonetheless. And I understood it, anticipated it. I anticipated the arguments that were going to be made because they laid them out really clearly before, and I anticipated in advance. When I first raised this, there'd been a number of correspondence over the course of a couple of years before we got to this lawsuit, and we've had a full and frank discussion of these issues in the past to the point where they suggested I read the trial transcript in the last trial, read every word of it, read everything that you could read about it so we understood what the case was about. (R. 110, p. 23 l. 18 – p. 24 l. 24) (emphasis added).

Gillmor's counsel, after conducting research, determined there were reasonable basis to bring the claims, as in *Barnard v. Sutliff*, 846 P.2d 1229, 1236 (Utah 1992). "Rule 11 does not impose a duty to do perfect or exhaustive research. The appropriate standard is whether the research was objectively reasonable under all of the circumstances." *Barnard* at 1236.

Just because Family Link and the District Court disagreed with Gillmor's position does not mean that Gillmor's counsel violated Rule 11 or that Family Link is entitled to sanctions. Rule 11 requires that an attorney make a reasonable inquiry into the validity of the action. There is no finding that Gillmor's counsel failed to investigate the claims asserted or that he failed to undertake appropriate legal

research prior to filing the Complaint. Instead the District Court determined that because *res judicata* applied, that sanctions must follow, and the Court of Appeals agreed with the District Court. Gillmor's attorney believed that the claims were (and are) warranted by existing statutory law. Rule 11(b)(2) therefore was not violated. (R. 110, p. 24 ll. 3-9 and R. 229, p. 32 ll. 12-19).

The Court of Appeals of Utah cites *Schoney v. Memorial Estates, Inc.*, 863 P.2d 59 (Utah Ct. App. 1993) as support for its position that Rule 11 sanctions are appropriate. *Gillmor* at ¶16. But *Schoney* is inapposite.

Unlike in *Shoney*, Gillmor and her counsel did not merely "file a new Complaint containing the original claims". *Shoney* at 60, n. 1. On the contrary, Gillmor's attorney researched the law, over the course of years, and determined that Gillmor could assert claims on grounds independent of claims asserted in prior litigation. (R. 229, p. 22 l. 23 – p. 23 l. 22). The Complaint asserted new factual predicates to the claims advanced, facts which were neither asserted nor entailed by any prior complaint and were grounded in law which was not involved in any prior complaint. That the District Court and a majority of the Court of Appeals ultimately disagreed is not sufficient to invoke Rule 11.

"Rule 11 does not impose a duty to do perfect or exhaustive research. The appropriate standard is whether the research was objectively reasonable under all of the circumstances." *Barnard* at 1236.

The legal theories in this case were 180 degrees apart from the legal theories in the last case, completely

and totally separate. The last case, the only one that Ms. Gillmor could possibly have binding against her because it's the only one she was the plaintiff in, in that case, she was arguing only on a contract. There was no argument about road-by-use ... I have a historian who spent thirty thousand bucks just to show this road's use since 1848. There is no question about good faith on the highway-by-use claim. ... And that's a completely new theory. (R. 229, p. 23 ll. 8 – 20).

As we're driving over the road, Your Honor, I happened to notice, right next to the road sweetheart trees. And 'C.S. + M. K. = True Love, 1958.' ... And the statute says if it is used as a public road for a period of ten years, continuously as a public thoroughfare, then it becomes a public road and can only be closed by the local government. (R. 229, p. 26 ll. 12-23).

[T]he fact is that the legislature chose to determine whether it's a public purpose or not, and they said it's a public purpose ... a by-road leading from a highway or residence and farms, which must by definition of legislative construction, be something different than a city/county road. (R. 229, p. 61 ll. 2- 13).

Even if a district court finds that a claim is not valid and subject to dismissal, Rule 11 sanctions do not ineluctably follow: "[W]e cannot say that [counsel's] reading of the law, alone, supports the conclusion that he did not make a reasonable inquiry into the claims, defenses, and other legal contentions contained in the complaint." *Hess v. Johnston*, 163 P.3d 747, 751 (Utah Ct. App. 2007). Rule 11 does not apply unless no reasonable attorney would have asserted the claims advanced in the Complaint, *i.e.*, every reasonable lawyer would believe that all of the claims of the Complaint were barred by the 2004 lawsuit. As that lawsuit concerned contract interpretation (which is what a dispute over a settlement involves) and did not concern public rights, as were asserted in this Complaint, it is error to think that no reasonable lawyer would have filed the Complaint.

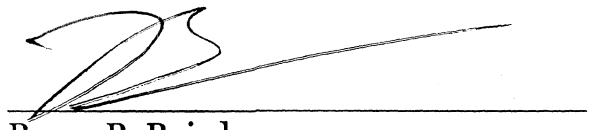
Unlike in *Pennington v. Allstate Insurance Co.*, 973 P.2d 932, 939 (Utah 1998), where the Court held that "pursuing an action to force an insurer to pay unreasonable and/or unnecessary medical charges to exceed the PIP cap is an improper purpose", no Utah Court has held that pursuing an action that is later found to be barred by *res judicata* is improper for the purpose of the imposition of Rule 11 sanctions.

CONCLUSION

Gillmor's action was not barred by *res judicata* and Rule 11(b)(2), UTAH CIV. P., was not violated and sanctions should not have been awarded. The Supreme Court of Utah should adopt the decision of the dissent of the Utah Court of Appeals, and return the case to the District Court for further proceedings on

the substance of Gillmor's Complaint.

DATED this 13th day of July, 2010.



Bruce B. Baird
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13 of July, 2010, two true and correct copies of the foregoing BRIEF OF APPELLANT were served by mail, postage fully prepaid, upon each of the following:

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Lenda Kay Platt

ADDENDUM

IN THE UTAH COURT OF APPEALS

----ooOoo----

Nadine Gillmor, Plaintiff, Appellant, and Cross-appellee, v. Family Link, LLC, a Utah limited liability company; Doug Carl Dohring, an individual and as trustee; David K. Richards; Barry Todd Miller; Joan Ellen Miller; Laurie Ann Dohring; Kenneth W. Macey; Robin A. Macey; and John Does 1-40, Defendants, Appellees, and Cross-appellants.	OPINION (For Official Publication) Case No. 20080757-CA F I L E D (January 14, 2010) 2010 UT App 2

Third District, Silver Summit Department, 070500385
The Honorable Robert K. Hilder

Attorneys: Bruce R. Baird and Dallis A. Nordstrom, Salt Lake City, for Appellant and Cross-appellee
Keith W. Meade, Elizabeth T. Dunning, and Edwin C. Barnes, Salt Lake City, for Appellees and Cross-appellants

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Before Judges Thorne, Bench, and Greenwood.[1]

BENCH, Senior Judge:

¶1 Plaintiff Nadine Gillmor (Mrs. Gillmor) appeals the district court's dismissal of her claims on res judicata grounds and imposition of sanctions against her attorney under rule 11(b)(2) of the Utah Rules of Civil Procedure for filing a claim without basis in law. Defendants cross-appeal the district court's

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1. Judges Russell W. Bench and Pamela T. Greenwood heard and voted on this case as regular members of the Utah Court of Appeals. They both retired from the court on January 1, 2010, before this decision issued. Hence, they are designated herein as Senior Judges. See Utah Code Ann. § 78A-3-103(2) (2008); Sup. Ct. R. of Prof'l Practice 11-201(6).

denial of sanctions under rule 11(b)(1) for filing a claim for an improper purpose. We affirm.[2]

BACKGROUND

¶2 In 1984, Mrs. Gillmor's husband, Charles Frank Gillmor Jr. (Mr. Gillmor), brought suit against David K. Richards. Mr. Gillmor sought a prescriptive easement or irrevocable license in an attempt to access his property (the Gillmor property) by way of two private roads, which run from a nearby highway and through Richards's property (the Richards property). The parties settled the 1984 suit by entering into an Easement and Use Agreement (the easement agreement). Following the settlement, upon the parties' joint stipulation, the district court dismissed with prejudice the 1984 suit on the merits.

¶3 In 2001, Mrs. Gillmor filed suit against the subsequent owners of the Richards property, seeking a declaration of her rights under the easement agreement.[3] Specifically, the 2001 suit concerned the authorized use of the roads to access the Gillmor property under the easement agreement. The district court's decision was appealed, and in Gillmor v. Macey, 2005 UT App 351, 121 P.3d 57, this court concluded that the easement agreement grants a personal easement to a limited class of people, including Mrs. Gillmor. See id. ¶¶ 15-23. We expressly held that Mrs. Gillmor's personal right to access the Gillmor property through the Richards property does not expand the rights of any other person to use the easements or the purposes for which the easements may be used beyond what is expressly authorized by the easement agreement. See id. ¶¶ 14, 23, 43. Further, this court concluded that those uses expressly authorized by the easement agreement, which would run with the property, were limited to very narrow and specific purposes. See id. ¶¶ 24-31. Consequently, use of the easements for purposes other than Mrs. Gillmor's own access was severely limited by the easement agreement. See id. ¶¶ 14, 23, 43.

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2. Because we conclude that Mrs. Gillmor's claims are barred by res judicata, we do not address Defendants' alternative argument that her claims are also barred by judicial estoppel.

3. Following the 1995 passing of Mr. Gillmor, Mrs. Gillmor became the owner of the Gillmor property. After the 1984 suit, the Richards property was partitioned and sold to other persons who were named as parties in the 2001 suit and the present suit. For the reader's convenience, we refer to these parcels collectively as the Richards property.

¶4 In 2007, Mrs. Gillmor filed the present suit against Defendants, owners of the Richards property, pleading condemnation and "highway-by-public-use." See generally Utah Code Ann. § 72-5-104 (2009) (permitting a highway to be dedicated to public use when "continuously used as a public thoroughfare for a period of ten years"). Like the 1984 and 2001 suits, this suit concerns use of the roads over the Richards property to access the Gillmor property. But this time a public right has been asserted, rather than a private right arising out of contract or property ownership. Defendants moved the district court to dismiss, arguing that Mrs. Gillmor's claims are barred by res judicata.

¶5 Before the district court, both parties' arguments focused solely on whether, under the claim preclusion branch of res judicata, Mrs. Gillmor's claims could and should have been brought in either of the two prior suits. Mrs. Gillmor's attorney, Bruce R. Baird, asserted that Mrs. Gillmor's claims were subject to "narrow exceptions" to res judicata, arguing that "'there are cases in which the doctrine of res judicata must give way to . . . overriding concerns of public policy and simple justice.'" (Quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 402-03 (1981) (Blackmun, J., concurring) (responding by separate concurrence to the lead opinion's rejection of an equitable exception to res judicata, see id. at 401, arguing that the majority should not "close the door" to such an exception).) Mr. Baird did not cite to any specific examples of exceptions to res judicata. Rather, Mr. Baird argued that Mrs. Gillmor should be permitted to pursue these legal theories, regardless of the two prior suits, because the theories alleged are public rights that can "be brought by other members of the public." Mr. Baird supported his argument only by referencing the policies behind res judicata, arguing that these policies would not be compromised by allowing Mrs. Gillmor to pursue her present suit because "the claims brought by [Mrs. Gillmor] are claims which can be brought by other members of the public . . . so judicial economy and multiple law suits should not be implicated simply because of the identity of the Plaintiff." To emphasize his point that any member of the public could allege these legal theories, Mr. Baird stated, "[I]f the Court dismisses [Mrs. Gillmor's claims,] I'll bring [the same causes of action] in somebody else's name."

¶6 Mr. Baird conceded that the legal theories alleged here could have been brought in either the 1984 or 2001 suits, as they were legally and factually available at those times. Mr. Baird also speculated that these theories were omitted from earlier suits for strategic purposes, stating that simultaneously bringing a claim for a public and private right of access "would have been pretty dicey."

¶7 Following oral argument, the district court ruled from the bench that Mrs. Gillmor's claims were barred by res judicata. The district court relied upon the preclusive effect of both the 1984 and 2001 suits. The district court found that the legal theories presented had been "legally and factually available for many decades" and reasoned that the three suits involved the same claim because each was motivated by a common goal--access to the Gillmor property. Accordingly, the district court concluded that these claims could and should have been presented in the prior suits. The district court also stated, without objection from either party, "There's no question about any of the other prongs of claim preclusion applying here."

¶8 Defendants then moved for sanctions under rule 11(b) of the Utah Rules of Civil Procedure. The district court imposed rule 11(b)(2) sanctions against Mr. Baird for filing a claim without basis in law because Mrs. Gillmor's claims were barred by res judicata. However, the district court declined to impose sanctions under rule 11(b)(1) for filing a claim with an improper purpose, finding no evidence that either Mrs. Gillmor or Mr. Baird acted with an improper purpose. Mrs. Gillmor appeals, and Defendants cross-appeal.

ISSUES AND STANDARDS OF REVIEW

¶9 Mrs. Gillmor first appeals the district court's determination that her claims are barred by the claim preclusion branch of res judicata. "Whether res judicata, and more specifically claim preclusion, bars an action presents a question of law that we review for correctness." Mack v. Utah State Dep't of Commerce, 2009 UT 47, ¶ 26, 635 Utah Adv. Rep. 79 (internal quotation marks omitted).

¶10 Mrs. Gillmor also appeals the district court's decision to impose sanctions against her attorney, Mr. Baird, under rule 11(b)(2) for filing a claim without basis in law. Defendants cross-appeal the district court's decision not to impose sanctions against both Mrs. Gillmor and Mr. Baird under rule 11(b)(1) for filing a claim with an improper purpose. "In reviewing a trial court's imposition of [rule 11] sanctions, . . . we first review the trial court's factual findings under the 'clearly erroneous' standard. We then review the trial court's legal conclusions for correctness. Finally, we review the type and amount of sanctions imposed under the abuse of discretion standard." Pennington v. Allstate Ins. Co., 973 P.2d 932, 936-37 (Utah 1998) (quoting Barnard v. Sutliff, 846 P.2d 1229, 1234-35 (Utah 1992)). The decision of whether to actually impose sanctions is ultimately within the district court's discretion. See Utah R. Civ. P. 11(c) ("If . . . the court determines that subdivision (b) has been violated, the court

may . . . impose an appropriate sanction . . . ." (emphasis added)); Crank v. Utah Judicial Council, 2001 UT 8, ¶ 34, 20 P.3d 307 ("[I]t remains within the court's discretion to apply sanctions under rule 11(c) even if it finds a violation of rule 11(b) . . . .").

> Decisions regarding rule 11 sanctions are best left in the hands of the trial court. We therefore accord reasonable discretion to the trial court to determine when sanctions are useful and appropriate. When applying the appropriate standards of review, we grant considerable deference to the trial court's factual findings and some deference to the trial court's application of the facts when reaching its legal conclusion of whether rule 11 has been violated. We also afford substantial deference to the trial court's ultimate determination of when, and to what extent, sanctions are a useful tool in controlling abuses of the judicial process.

Archuleta v. Galetka, 2008 UT 76, ¶ 7, 197 P.3d 650.

ANALYSIS

I. Res Judicata

¶11 Mrs. Gillmor first argues that the district court erroneously concluded that her claims are barred by the claim preclusion branch of res judicata. "Claim preclusion is premised on the principle that a controversy should be adjudicated only once," Mack v. Utah State Dep't of Commerce, 2009 UT 47, ¶ 29, 635 Utah Adv. Rep. 79 (internal quotation marks omitted), and "reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so," American Estate Mgmt. Corp. v. International Inv. & Dev. Corp., 1999 UT App 232, ¶ 12, 986 P.2d 765 (internal quotation marks omitted). Whether claim preclusion bars the relitigation of certain claims depends upon full satisfaction of a three-part test:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Mack, 2009 UT 47, ¶ 29 (internal quotation marks omitted). Because the parties below contested only the second prong of claim preclusion, our analysis will focus on whether the claims at issue in this case could and should have been brought in either the 1984 or 2001 suits.[4]

¶12 "A claim or cause of action is the aggregate of operative facts which give rise to a right enforceable in the courts." Id. ¶ 30 (internal quotation marks omitted). "Claims or causes of action are the same as those brought or that could have been brought in the first action if they arise from the same operative facts, or in other words from the same transaction." Id. (citing Restatement (Second) of Judgments § 24 (1982)).[5] "What factual grouping constitutes a 'transaction,' . . . [is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation[and] whether they form a convenient trial unit

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4. Neither party has ever contested that both the 1984 and 2001 suits resulted in a final judgment on the merits. And below, neither party challenged whether the parties here are either the same parties as or are in privity with the parties from the two prior suits. At oral argument before this court, Mr. Baird asserted for the first time that Mrs. Gillmor is not in privity with her husband, Mr. Gillmor. Because this argument was not properly preserved, we will not address it. See Utah R. App. P. 24(a)(5)(A) (requiring a party to show that the issue being appealed was preserved in the trial court); Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998) (explaining preservation requirement and stating that "[i]ssues not raised at trial are usually deemed waived"); State v. Marble, 2007 UT App 82, ¶ 19, 157 P.3d 371 (declining to review on appeal an issue raised for the first time at oral argument).

5. In Mack v. Utah State Department of Commerce, 2009 UT 47, 635 Utah Adv. Rep. 79, the Utah Supreme Court expressly adopted the transactional theory as articulated in the Restatement (Second) of Judgments § 24 (1982), concerning the same claim element of claim preclusion:

> Previously we have held that two causes of action are the same if they rest on the same 'state of facts,' and the evidence 'necessary to sustain the two causes of action' is of the same kind or character. Schaer v. State, 657 P.2d 1337, 1340 (Utah 1983). More recently, however, we have moved toward the transactional theory of claim preclusion espoused by the Restatement (Second).

Id. ¶ 30.

. . . ." Restatement (Second) of Judgments § 24(2). See generally id. § 24 cmt. b (explaining what constitutes a transaction). Accordingly, "res judicata . . . turn[s] on the essential similarity of the underlying events giving rise to the various legal claims," Mack, 2009 UT 47, ¶ 30 (internal quotation marks omitted), or a common motivation behind those claims, see Restatement (Second) of Judgments § 24(2), "[r]ather than resting on the specific legal theory invoked," Mack, 2009 UT 47, ¶ 30 (alteration in original) (internal quotation marks omitted). "Defining the scope of a claim or cause of action is not an exact science and, in fact, is at times driven by the relative importance of the finality of judgment. When, as in this case, . . . real property is at issue, the need for finality is at its apex." American, 1999 UT App 232, ¶ 10 (citations omitted).

¶13 Although Mrs. Gillmor has alleged different legal theories in the present suit, we conclude that these theories "could and should have been raised" in either the 1984 or 2001 suits. See Mack, 2009 UT 47, ¶ 29 (internal quotation marks omitted). All three suits have had an identical motivation calculated to obtain a common goal: use of roads over the Richards property in order to more easily access the Gillmor property. Therefore, each suit has asserted the same claim. Further, Mrs. Gillmor has conceded that the legal theories at issue here were legally and factually available before the 1984 suit and, therefore, could have been pleaded in either of the two prior suits.

¶14 It appears that a claim based on public rights may have been intentionally ignored or strategically sacrificed in favor of asserting a private right. When the district court inquired why Mrs. Gillmor had not asserted public rights before, Mr. Baird speculated that omitting these theories may have been a strategic decision, stating that simultaneously asserting a public and private right to access "would have been pretty dicey." The district court then characterized Mrs. Gillmor's present suit as being a last resort to gain access in response to the less-than-favorable result of the 2001 suit: "[Mrs. Gillmor] argues that her present legal causes of action were utterly unnecessary until the Court of Appeals ruled against her, but that argument only suggests that litigation choices were made, as they should be, and not every possible theory was advanced." Further, the record indicates that the Gillmors sought a private right to access the Gillmor property over the Richards property, to the exclusion of a public thoroughfare, and that Mrs. Gillmor would prefer that the roads remain private. This is not only a strategic decision on how to present the claim, but it is also a choice as to the desired objective of the litigation. Whether "purposely or negligently," the Gillmors failed to assert all available theories supporting their claim "by all proper means within [their] control." See American, 1999 UT App 232, ¶ 12 (internal quotation marks omitted). They cannot "be permitted to . . .

relitigate the same matters between the same parties." See id. (internal quotation marks omitted). Nor may they now "pursue their claim . . . through piecemeal litigation, [having offered] one legal theory to the court while holding others in reserve for future litigation," which are now being asserted because the first two suits have "prove[n] unsuccessful." See id. ¶ 14. Mrs. Gillmor cannot now be allowed yet another "attempt at substantially the same objective under a different guise." See Wheadon v. Pearson, 14 Utah 2d 45, 376 P.2d 946, 948 (1962). Accordingly, the district court correctly concluded that Mrs. Gillmor's claims are barred by res judicata.

II. Rule 11 Sanctions

¶15 Both parties challenge the district court's decision concerning the imposition of sanctions. Rule 11(b) states in pertinent part,

> (b) By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]

Utah R. Civ. P. 11(b)(1)-(2). Each subpart of rule 11(b) provides a separate basis for sanctionable conduct that must be independently met. See id. R. 11(c); Crank v. Utah Judicial Council, 2001 UT 8, ¶ 33, 20 P.3d 307. We emphasize that "[d]ecisions regarding rule 11 sanctions are best left in the hands of the trial court." Archuleta v. Galetka, 2008 UT 76, ¶ 7, 197 P.3d 650. We therefore "afford substantial deference to the trial court's ultimate determination of when, and to what extent, sanctions are a useful tool in controlling abuses of the judicial process." Id.

A. Rule 11(b)(2)

¶16 Mrs. Gillmor argues that the district court improperly imposed sanctions against Mr. Baird for violating rule 11(b)(2) of the Utah Rules of Civil Procedure by filing a claim that is not "warranted by existing law or by a nonfrivolous argument for [a change in] . . . existing law." See Utah R. Civ. P. 11(b)(2). See generally id. R. 11(c)(2)(A) (stating that although sanctions may be imposed against attorneys or parties, sanctions may not be imposed against a represented party for violation of subsection 11(b)(2)). Whether a claim is warranted by existing law or by a nonfrivolous argument for the change in existing law is not determined by whether the argument is the correct legal position but by whether it is "objectively reasonable under all the circumstances." Barnard v. Sutliff, 846 P.2d 1229, 1236 (Utah 1992). Here, the district court's determination that Mr. Baird had violated rule 11(b)(2) was premised upon the court's conclusion that Mrs. Gillmor's claims were barred by res judicata. See generally Schoney v. Memorial Estates, Inc., 863 P.2d 59, 62 (Utah Ct. App. 1993) (affirming trial court's imposition of rule 11 sanctions against plaintiff who attempted to relitigate identical claims that were clearly barred by res judicata). In view of our conclusion that Mrs. Gillmor's claims are barred by res judicata, the appropriate standard of review is whether the district court's decision to impose sanctions was an abuse of its discretion. See Archuleta, 2008 UT 76, ¶ 7.

¶17 The district court began its rule 11(b)(2) analysis by concluding that Mrs. Gillmor's claims were barred by res judicata: neither party had contested the privity and finality elements; and the present suit involved the same claim as the 1984 and 2001 suits because each suit claimed access to the Gillmor property based on facts and legal theories that had been available at those times. The district court wrote that it was "at a loss to understand how plaintiff could have brought the present action without violating [r]ule 11(b)(2) [because] once the three elements [of res judicata] are satisfied, [it was] unaware of any exceptions to application of the bar imposed by res judicata, and plaintiff has not identified any such exception." (Emphasis added.)

¶18 The district court's finding that Mr. Baird did not present any legal authority in support of the purported exceptions to res judicata is particularly persuasive. Mr. Baird argues that "the mere fact that [his] view of the law was wrong cannot support a finding of a rule 11 violation." See generally Barnard, 846 P.2d at 1236. However, it is not that Mr. Baird's arguments below were wrong but that those arguments were not supported by any legal authority--especially given the fact that Mr. Baird had anticipated the res judicata issue before filing this suit. In light of the filing of a claim barred by res judicata and the absence of any legal authority in support of Mr. Baird's

arguments below concerning exceptions to res judicata, we cannot say that the district court abused its considerable discretion in imposing sanctions against Mr. Baird for violating rule 11(b)(2).

B. Rule 11(b)(1)

¶19 Defendants argue on cross-appeal that the district court improperly denied their motion for sanctions against both Mrs. Gillmor and Mr. Baird under rule 11(b)(1) for filing a claim with an improper purpose. See Utah R. Civ. P. 11(b)(1). See generally id. R. 11(c) (allowing sanctions to be imposed against attorneys and parties). Whether a party acted with an improper purpose is a question of fact, reviewed under the clearly erroneous standard. See Pennington v. Allstate Ins. Co., 973 P.2d 932, 937 (Utah 1998) (characterizing a party's purpose under rule 11(b)(1) as an issue of intent, which is a question of fact reviewed under the clearly erroneous standard); Edwards v. Powder Mountain Water & Sewer, 2009 UT App 185, ¶ 25, 214 P.3d 120 ("We must uphold a trial court's factual findings regarding whether rule 11 has been violated unless the evidence clearly weighs against such findings."). "A factual finding is deemed clearly erroneous only if it is against the clear weight of the evidence," and "we will not overturn a trial court's factual findings if its account of the evidence is plausible in light of the record viewed in its entirety." Pennington, 973 P.2d at 937 (internal quotation marks omitted).

¶20 In denying Defendants' request to impose sanctions against Mrs. Gillmor and Mr. Baird for violating rule 11(b)(1), the district court wrote that it could "see no evidence of a purpose to harass, delay, . . . impose unnecessary cost[,] . . . or needlessly increase the costs of litigation." Rather, the district court stated that Mrs. Gillmor's purpose was clear: "to obtain access that has not been obtained through previously advanced theories." After reviewing the record, we cannot say that the district court's findings are against the clear weight of the evidence. We, therefore, will not disturb the district court's decision not to impose sanctions against Mrs. Gillmor and Mr. Baird for violating rule 11(b)(1).

CONCLUSION

¶21 The district court correctly concluded that Mrs. Gillmor's claims are barred by res judicata. All three suits brought by the Gillmors have asserted the same claim: use of the roads over the Richards property to more easily access the Gillmor property. And the theories alleged here were legally and factually available when the first suit was filed. Therefore, these theories could and should have been raised in one of the prior suits. The district court acted within its discretion in

imposing sanctions against Mr. Baird for violating rule 11(b)(2) and denying sanctions under rule 11(b)(1).

¶22 Accordingly, we affirm.[6]

Russell W. Bench, Senior Judge

¶23 I CONCUR:

Pamela T. Greenwood, Senior Judge

THORNE, Judge (concurring in part and dissenting in part):

¶24 I concur in the general statement of the law of res judicata and rule 11 sanctions as set out in the majority opinion but dissent from application thereof to the instant case. I disagree with the majority's conclusion that each of the three actions asserted sufficiently similar claims, see supra ¶ 13, and, that, therefore, the third action is barred by the claim preclusion branch of res judicata. The suits initiated in 1984 and 2001 were private claims, the first for a prescriptive easement or irrevocable license and the second for a declaration of rights under the easement agreement negotiated in the previous case. These private claims are different than and may be pursued separately from the public interest claim under Utah Code section 72-5-104 (the Dedication Statute) as initiated in the present suit. See Utah Code Ann. § 72-5-104 (2009).

¶25 Although the public interest claim could have been presented in either the 1984 or 2001 suit, I do not believe that it should necessarily have been raised in the previous actions for several reasons. First, neither Mr. Gillmor in his 1984 action nor Mrs. Gillmor in her 2001 action were obligated to bring a public claim--seeking a right for the members of the public to use the

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6. We do not address Defendants' request for attorney fees under rule 33 of the Utah Rules of Appellate Procedure because it was inadequately briefed. See generally Valcarce v. Fitzgerald, 961 P.2d 305, 313 ("[A]n appellate court will decline to consider an argument that a party has failed to adequately brief.").

Richards property--in their pursuit of a determination of their own private right to use of the property. Indeed, the Gillmors' decision not to pursue a public claim under the Dedication Statute ought not preclude any member of the general public from initiating such a suit at a later time. The objective of claim preclusion is "that a controversy should be adjudicated only once," see Mack v. Utah State Dep't of Commerce, 2009 UT 47, ¶ 29, 635 Utah Adv. Rep. 79 (internal quotation marks omitted). This, however, is not feasible in the present case where members of the public may still pursue a public claim regardless of prior private right litigation.

¶26 Application of claim preclusion to this matter would lead to an illogical result. A literal application of claim preclusion in the present case would have the effect of preventing all members of the public from bringing a public claim based on the res judicata ruling barring the Gillmors from pursuing such a public claim. Even if claim preclusion were applied only to the Gillmors, the majority's decision today would be illogical in that it would prevent the Gillmors from pursuing a claim which any other member of the public might bring seeking the declaration of a public right in this piece of property. Instead of ending a dispute about the rights pertaining to a parcel, the majority decision simply delays the resolution for another day.

¶27 Second, the private claims asserted in the 1984 and 2001 actions are inherently different and require the presence of different factual determinations than the present public claim under the Dedication Statute.[7] As such, I would reverse the district court's dismissal of Mrs. Gillmor's public claim on res judicata grounds.

¶28 Because I would reach a different conclusion on the issue of res judicata than the majority, it follows that Mrs. Gillmor's claim was asserted with a good faith argument against res judicata, see Utah R. Civ. P. 11(b)(2) (providing that rule 11 is

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7. The 1984 action asserted a claim for prescriptive easement. To establish a prescriptive easement, a claimant "must establish a use that is open, notorious, adverse, and continuous for at least twenty years." Edgell v. Canning, 1999 UT 21, ¶ 8, 976 P.2d 1193. The 2001 action sought a declaration of rights under the easement agreement negotiated in the previous case. Neither of these two causes of action require, as does the present claim, proof that the property has been continuously used by the public as a public thoroughfare. See Jennings Inv., LC v. Dixie Riding Club, Inc., 2009 UT App 119, ¶ 10, 208 P.3d 1077, cert. denied, 215 P.3d 161 (Utah 2009). "To satisfy the public thoroughfare element, [p]laintiffs must demonstrate proof of (i) passing or travel, (ii) by the public, and (iii) without permission." Id. ¶ 11.

violated when an attorney fails to make a reasonable inquiry to assure that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"), is "objectively reasonable under all the circumstances," Barnard v. Sutliff, 846 P.2d 1229, 1236 (Utah 1992), and should not result in rule 11(b) sanctions. Even if I am wrong and have erroneously applied the claim preclusion branch of res judicata, this is not enough to support a rule 11 violation. See id. ("[T]he mere fact that the attorney's view of the law was wrong cannot support a finding of a rule 11 violation."). Accordingly, I would reverse the district court's decision concerning the imposition of sanctions.

_____
William A. Thorne Jr., Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st of July, 2010, two true and correct copies of the Addendum to the BRIEF OF APPELLANT were served by mail, postage fully prepaid, upon each of the following:

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